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In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 12

THE UNITED STATES OF AMERICA,
Petitioner,

v.

APPALACHIAN ELECTRIC POWER COMPANY,
Respondent.

BRIEF AMICUS CURIAE FILED ON BEHALF OF THE STATE OF WISCONSIN

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I.

STATEMENT

The State of Wisconsin is vitally concerned with the extreme interpretation which the petitioner takes in this case with respect to purported federal authority under the Federal Power Act and particularly the second paragraph of sec. 23 (b) of said Act.[1]

[1] "* * * Any person, association, corporation, state, or municipality intending to construct a dam or other project works across, along, over, or in any stream or part thereof, other than those defined herein as navigable waters, and over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several states shall before such construction file declaration of such intention with the Commission, whereupon the Commission shall cause immediate investigation of such proposed construction to be made, and if

The position taken by the petitioner (petitioner's brief, pp. 89 to end), it seems to us, completely sets at naught accepted concepts of the limitation of federal authority over non-navigable streams and the recognized and accepted concepts of the plenary power of the state with respect thereto.

The argument of the petitioner, indeed, is grounded upon the fundamental theory that the water-power resources of the states are the "heritage" of the federal government rather than of the states. This concept, so it seems to us, is so far reaching as to completely reverse accepted and well-recognized constitutional concepts.

The position of the petitioner would enable the government to take over water powers on non-navigable streams which the federal government clearly has no constitutional authority to acquire or operate and thereby, among other things, deprive the state of its constitutional right to stimulate private development of water-power resources in the state with consequent increase in tax revenues or to develop or acquire the projects for itself or the various municipalities of the state so as to obtain the profits or benefits of public operation.

The extreme position asserted by the petitioner would severely burden and impede the development of the water resources of Wisconsin for power, recreational, and other public purposes in contravention of the state's declared

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upon investigation it shall find that the interests of interstate or foreign commerce would be affected by such proposed construction such person, association, corporation, state, or municipality shall not construct, maintain, or operate such dam or other project works until it shall have applied for and shall have received a license under the provisions of this Act. If the Commission shall not so find, and if no public lands or reservations are affected, permission is hereby granted to construct such dam or other project works in such stream upon compliance with state laws."

public policy. It invades the sovereignty of the State of Wisconsin acting within its constitutional sphere.

Indeed, the Federal Power Commission is at present asserting within the State of Wisconsin the exact position asserted by the petitioner in the instant case and is attempting to invade the sovereignty of the State of Wisconsin by attempting to impose a full conditioned license on a power dam in a non-navigable stream in Docket DI-134, Wisconsin, now pending before the Federal Power Commission. The construction of the dam was authorized by the legislature of this state in 1887 (prior to the enactment of the Rivers and Harbors Act). It is locaed near Tomahawk, Wisconsin, upon a non-navigable reach of the Wisconsin River (even conceding that the Wisconsin River is navigable as far as Portage, which we deny) and cannot possibly substantially affect adversely any commerce or the navigable capacity of any navigable reaches of the Wisconsin River (if there are any such reaches, which we deny).

II.

POSITION OF THE STATE OF WISCONSIN AND SCOPE OF THIS BRIEF

It has been our privilege to read and study the very able brief submitted amici curiae on behalf of the States of North Carolina, et al. We fully agree with all positions taken in that brief and the arguments made in relation thereto. For the sake of brevity we shall not repeat in this brief either the positions taken in that brief or the arguments made in support thereof. The brief referred to presents ably and comprehensively the scope of federal power and jurisdiction and the limitations with respect thereto over navigable waters of the United States as well

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[1]When the term "commerce" is used in this brief, it refers to interstate commerce.

as the extremely limited scope of federal jurisdiction over non-navigable waters. In this brief we shall present

(1) The corollary to said concept, namely, the extent of state power and jurisdiction over navigable waters of the United States and the plenary power of the state's jurisdiction with respect to non-navigable waters (non-navigable in the federal sense).

(2) We shall then amplify somewhat more than is done in the preliminary statement the importance of the case to the State of Wisconsin, and then show

(3) The conflict in policy and sovereignty between the Federal Power Act and our own state statutes pertaining to waters, their development, protection, and preservation.

III.

ARGUMENT

(1) *The Extent of State Power and Jurisdiction Over Navigable Waters of the United States And the Plenary Power of the State's Jurisdiction with Respect to Non-navigable Waters*

As has been heretofore stated, the brief filed amici curiae by the States of North Carolina, et al., develops very fully the scope of federal power and jurisdiction and the limitations with respect thereto over navigable waters of the United States as well as the very limited constitutional scope of federal jurisdiction over non-navigable

waters (non-navigable in the federal sense). It probably follows as a matter of course that that jurisdiction which is not lodged with the federal government necessarily is lodged with the states. However, it may not be amiss and may be of some help to cite briefly some of the cases which deal with the scope of state power as distinct from those cases which deal with the extent and limitations of federal power.

Section 3 of Article IX of the Constitution of the State of Wisconsin provides as follows:

> "The people of the state, in their right of sovereignty, are declared to possess the ultimate property, in and to all lands within the jurisdiction of the state; and all lands the title to which shall fail from a defect of heirs shall revert or escheat to the people."

The Supreme Court in *Angelo v. Railroad Commission,* 194 Wis. 543, at page 550, commenting on this provision, states:

> "This provision 'is an explicit assertion of a fundamental attribute of state sovereignty. Under such power as sovereign the state had, at the moment of its creation, the right to determine all matters concerning the title to lands covered by navigable waters, subject only to the paramount authority of the federal government, in matters concerning navigation as a part or means of interstate commerce and of its proper disposal by the United States prior to statehood.'"

Justice Taney in *Martin v. Waddell,* (1842) 16 Peters 366, says:

> "When the American Revolution took place, the people of each state became themselves sovereign; and in that character, held the absolute right to all

> their navigable waters, and the soils under them, for their own common use, subject only to the rights since surrendered by the constitution to the general government."

And again:

> "* * * when the people of New Jersey took possession of the reins of government, and took into their own hands the power of sovereignty, the prerogatives and regalities which before belonged either to the crown or the parliament, became immediately and rightfully vested in the state."

In *Shively v. Bowlby,* 152 U. S. 1, 14-15, the court said in part:

> "And upon the American Revolution, all the rights of the Crown and of Parliament vested in the several states, subject to the rights surrendered to the national government by the Constitution of the United States."

New states admitted to the Union after the adoption of the Constitution of the United States entered the Union on the same basis as the original states.

In *Pollard's, Lessee, v. Hagan,* (1845) 3 Howard (U. S.) 212, the court cited the oft-quoted phrase (p. 229):

> "When the Revolution took place, the people of each state became themselves sovereign; and in that character hold the absolute right to all their navigable waters, and the soils under them for their own common use, subject only to the rights since surrendered by the Constitution."

In *Hardin v. Jordan,* 140 U. S. 371, it was held that the title to the shore and land under water was incidental

to the sovereignty of the state and such lands are subject to state regulation and control subject to the control by Congress with respect to navigation.

Again in *Port of Seattle v. Oregon & Washington Rail-Road Co., et al.,* (1921) 255 U. S. 56, Justice Brandeis said (p. 63):

> "The right of the United States in the navigable waters within the several states is limited to the control thereof for purposes of navigation."

No general rule was laid down by the federal government to guide the states in their control over such waters and lands under such waters, but on the contrary it has been held that it was for the several states themselves to determine in what waters and to what extent the prerogatives of the state should be exercised in the regulation and control of such waters and the beds thereunder. *Weber v. Harbor Commissioners,* 18 Wall. 57.

In *Barney v. Keokuk,* 94 U. S. 324, 338, the court says:

> "If they choose to resign to the riparian proprietor rights which properly belong to them in their sovereign capacity, it is not for others to raise objections."

Thus each state in its sovereign capacity establishes its own law governing the respective rights of the public and of the riparian owners with respect to the waters and their soils.

In *Hudson County Water Co. v. McCarter,* 209 U. S. 349, 356, the court held Chapter 238, Laws of New Jersey, 1905, prohibiting the transportation of water of the state into another state to be constitutional. The court said in part as follows:

"* * * But we agree with the New Jersey courts, and think it, quite beyond any rational view of riparian rights that an agreement, of no matter what private owners, could sanction the diversion of an important stream outside the boundaries of the State in which it flows. The private right to appropriate is subject not only to the rights of lower owners but to the initial limitation that it may not substantially diminish one of the great foundations of public welfare and health.

"We are of opinion, further, that the constitutional power of the State to insist that its natural advantages shall remain unimpaired by its citizens is not dependent upon any nice estimate of the extent of present use or speculation as to future needs. The legal conception of the necessary is apt to be confined to somewhat rudimentary wants, and there are benefits from a great river that might escape a lawyer's view. But the State is not required to submit even to an aesthetic analysis. Any analysis may be inadequate. It finds itself in possession of what all admit to be a great public good, and what it has it may keep and give no one a reason for its will."

Congress has no power to impair the natural advantages which a state possesses in its waters, except as an incident to its legitimate power to improve a navigable stream of the United States for navigation. It must necessarily follow that Congress has no power to impair, regulate, control or take over the natural advantages which a state possesses in its waters, except as state sovereignty may be incidentally affected by the Congress exercising its constitutional power of improving navigable waters of the United States for navigation (navigation used in the sense of improving for interstate commerce). It would seem to follow that the federal government may not enter upon a non-navigable stream and

construct and operate a water storage reservoir for the improvement of navigation in navigable waters of the United States unless permitted by state law and upon compliance with all state requirements, as the authority of the federal government and the extent of its jurisdiction and sovereignty over non-navigable streams is that of enjoining a use thereof which will substantially adversely affect the navigable capacity of navigable waters of the United States where navigation is a recognized fact.

Thus, in *United States v. Rio Grande Dam and Irrigation Company,* 174 U. S. 690, the court says at page 709:

> "Of course, when such proceedings are instituted it becomes a question of fact whether the act sought to be enjoined is one which fairly and directly tends to obstruct (that is, interfere with or diminish) the navigable capacity of a stream. It does not follow that the courts would be justified in sustaining any proceeding by the Attorney General to restrain any appropriation of the upper waters of a navigable stream. The question always is one of fact, whether such appropriation substantially interferes with the navigable capacity within the limits where navigation is a recognized fact."[1]

[1]See also:

St. Anthony Falls Water Co. v. St. Paul Water Commissioners, 168 U. S. 349.
Pollard v. Hagan, 3 How. 212, 230.
Mumford v. Wardwell, 6 Wall. 423, 436.
Weber v. Board of Harbor Commissioners, 18 Wall. 57, 65.
County of St. Clair v. Lovingston, 23 Wall. 46, 68.
McCready v. Virginia, 94 U. S. 391, 394.
Knight v. United States Land Association, 142 U. S. 161, 183.
Leovy v. United States, 177 U. S. 621, 633.
Kansas v. Colorado, 206 U. S. 46, 93.
Scott v. Lattig, 227 U. S. 229, 242.
Port of Seattle v. Oregon & Washington R. R. Co., 255 U. S. 56, 63.
United States v. River Rouge Improvement Co., 269 U. S. 411, 419.

It would seem to follow from the foregoing cases and those cited in the footnote that the state as sovereign has the exclusive and unrestricted right to determine riparian rights in navigable waters and the exclusive and unrestricted right to use and dispose of navigable waters and the land under them, and to authorize the use by others, and to regulate and control them in whatever manner it sees fit, subject only to the power of Congress in respect to navigation (commerce).

(2) *Amplification of the Importance of the Case to the State of Wisconsin*

The number of power dams in Wisconsin having an installed capacity of 100 horse power or more in 1938 was 184 or more.[1] Many water power sites in the state are underdeveloped. The above number would be greatly augmented if power dams with an installed capacity of less than 100 horse power, but capable of developing more than 100 horse power, were included.

There are 151 public utility dams in the state, 240 private power dams, 243 dams creating artificial ponds or lakes for recreation, cranberry culture, and other purposes. There are approximately 168 dams for the control and regulation of natural lakes. The total number of dams in the state is approximately 805.[2] The number of dams in the state capable of developing 50 theoretical horse power for 50 per cent of the time is approximately

[1] Letter from the Power Commission to the United States Senate, Document 125, 76th Congress, 1st Session.

[2] All of the foregoing figures are taken from the records of the Public Service Commission of the State of Wisconsin.

450.[1] Of this number the following are located in navigable waters of the United States:

Fox River—9 government dams (federal)
3 private power dams
1 municipally owned dam

Rock River—1 privately owned dam at Beloit

Wisconsin River—1 privately owned dam at Prairie du Sac (if the Wisconsin River as far as Portage is a navigable stream of the United States, which the state denies)

All other dams are located in streams which are non-navigable (in the federal sense).

Wisconsin has adopted a comprehensive statutory scheme for the conservation, development, and regulation of its water resources, particularly for the development of hydraulic and electric power and for extending, developing, and protecting the abundant water areas for recreational uses. Manufacturing and the recreation industries are the leading industries of the state. The center or hub of this statutory scheme is the policy of the state to encourage the private development of dams in the waters of the state for power and other purposes and for creating water storage reservoirs for stream regulation under statutory permits, whereby the dams and appurtenant project works may be recaptured by the state or a municipality thereof. If the dam is constructed under the so-called Water Power Law, Chapter 31, Wiscon-

[1] All of the foregoing figures are taken from the records of the Public Service Commission of the State of Wisconsin.

sin Statutes, the project may be recaptured after 30 years and upon one year's notice.[1]

Reservoirs, dams, and other works and property for stream regulation constructed by any of the three reservoir companies in Wisconsin may be acquired by the state at any time for the compensation provided for in the statute if it shall have the constitutional power to do so.[2]

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[1] "31.09 **Proposals to accompany applications.** Each applicant for a permit to construct, operate and maintain a dam for the purpose of developing power or for the purpose of aiding in the development of power by other dams through the creation of reservoirs or otherwise, and each applicant for a permit to construct, operate and maintain a dam for any other purpose whatsoever, which is capable of developing fifty theoretical horse power or more available for fifty percent of the time throughout the year, shall file with his application for a permit, in addition to the requirements of section 31.05 or section 31.07, as the case may be, the following proposals:

(1) That the commission prior to the time the permit is granted shall value the dam site and all flowage rights and other property necessary for the purposes set forth in the application for the permit, whether the same or any part thereof are owned by the applicant or not.

(2) That the commission shall audit all outlays for property and for the construction of the dam, buildings, and other structures and works constructed, maintained, and operated and used and useful under the permit.

(3) That the permit, if granted, shall be granted and accepted subject to the express condition that the state of Wisconsin, if it shall have the constitutional power, or any municipality, on not less than one year's notice, at any time after the expiration of thirty years after the permit becomes effective, may acquire all of the property of the grantee, used and useful under the permit, by paying therefor, the cost of reproduction in their then existing condition of all dams, works, buildings, or other structures or equipment, used and useful under the permit, as determined by the commission, and by paying in addition thereto the value of the dam site and all flowage rights and other property as determined by the commission prior to the time the permit was granted, as provided in subsection (1), plus the amounts paid out for additional flowage rights, if any, acquired after the valuation made by the commission as provided in subsection (1); and that the applicant waives all right to any further compensation." Wisconsin Statutes, 1939.

[2] Wisconsin Valley Improvement Company Reservoir Act, Chapter 335, Laws of 1907; Chippewa and Flambeau Improvement Company Reservoir Act, Chapter 640, Laws of 1911; and Wolf River Reservoir Company Act, Chapter 441, Laws of 1939.

The Wisconsin Valley Improvement Company Act, Chapter 335, Laws of 1907, states the purposes of the act to be: "To create, construct, acquire,

Under the three public acts (see footnote 2, p. 12), as amended,[1] water storage reservoirs for stream regulation have been constructed in the headwaters of the principal rivers of the state, namely, the Wisconsin, Tomahawk, Chippewa, and Flambeau. The reservoirs, 25 in number, have a total storage capacity of 32,533 million cubic feet of water.[2] The reservoirs are constructed and operated at the cost of the water powers benefited, each paying in proportion to the benefits conferred upon it by the reservoir system, the Public Service Commission of Wisconsin being the state agency authorized to determine the amount of tolls to be paid by each toll payer. The Wisconsin Legislature of 1939 enacted Chapter 441, laws of that year, authorizing the Wolf River Reservoir Company to construct water storage reservoirs in the headwaters of the Wolf River and to collect tolls in proportion to the benefits conferred on the water powers in the Wolf and Fox Rivers.

The Northern States Power Company operates four reservoir dams for stream regulation and one dam for power and storage in the headwaters of the Chippewa River in Wisconsin. The combined storage capacities of these five projects is 6,082 million cubic feet.[2]

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maintain, and operate a system of water reservoirs located in and along the Wisconsin River and certain of its tributaries for the purpose of impounding surplus waters in times of great supply and releasing the same in times of drought and scarcity of water for the purpose of improving the navigation of the Wisconsin and Tomahawk Rivers and improving the usefulness of said streams for all public purposes and of diminishing the damage and injury by floods and freshets to property, both public and private, along said rivers."

[1] Amendments are not material as they do not change policy.

[2] Records of the Public Service Commission of Wisconsin.

(3) *The Conflict In Policy and Sovereignty Between the Federal Power Act and Our Own State Statutes Pertaining to Waters, Their Development, Protection, and Preservation*

The license provisions or conditions contained in a full conditioned license under the Federal Power Act and which have no relation to the protection of navigation are in excess of federal constitutional power and are objectionable whether the dam is located upon navigable waters of the United States or located upon non-navigable waters (non-navigable in the federal sense). However, in the instant case the petitioner seeks to impose these license provisions with respect to a dam which is located in non-navigable waters (findings of two federal courts) and which does not adversely affect other commerce or navigable capacity of navigable waters of the United States (findings of two federal courts). The petitioner contends that a dam so located and so operated is subject to the provisions of section 23 (b) of the Federal Power Act. It is our position that section 23 (b) does not apply to any such project. The scope, purpose and intent of section 23 (b) is admirably analyzed in the brief for the respondent, pp. 95-103. We agree with the position taken by the respondent. We adopt this argument as it impresses us as logical and essentially sound.[1]

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[1] Furthermore, even assuming that section 23 (b) of the Federal Power Act has any application at all to non-navigable streams, which we deny, said section does not deal with navigability or navigable capacity but with the effect upon interstate commerce and by the express language of said section. Where there is no commerce that can be affected, the section obviously can have no application. *United States v. Rio Grande Dam and Irrigation Company*, 174 U. S. 690.

Section 14 of the Federal Power Act authorizes the United States to take over the licensed property at the expiration of the license, which may be for a period of 50 years or less. Under the Wisconsin law the state, if it shall have the constitutional power, or a municipality may recapture the permitted project after 30 years from the date of issuing the permit.[1]

The conflict in sovereignty is obvious. The right of the State acting in its sovereign capacity to impose this condition was established in *Fox River Paper Company et al. v. Railroad Commission*, 274 U. S. 651.[2] This case

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[1] Section 31.09, Wisconsin Statutes set forth in footnote 1 of this brief on page 12.

[2] Petitioner's arguments that the validity of the recapture clause of the Federal Power Act is conclusively established by *Fox River Paper Co. v. Railroad Commission*, 274 U. S. 651, is wholly without foundation. That case involved the right of the State of Wisconsin to recapture a project under Section 31.09 (Wisconsin Statutes) and there are, of course, wide differences between the power of the federal government on the one hand and the power of the State on the other, for the State, unlike the federal government, may establish its own law of riparian property rights which, of course, includes the right to prohibit the project entirely. If the State may prohibit entirely, it may impose such conditions as it deems consonant with its public policy with respect to developing its water resources and may impose as a condition of the permit the right of the State to recapture when it shall have the constitutional power or permit a municipality to recapture under the same terms.

This court held in that case that the decision of the highest court of Wisconsin as to the nature and extent of riparian rights in that state was binding upon it. The Wisconsin Supreme Court had held that the riparian owners had no vested rights because (1) riparian rights on navigable waters of the state are subordinate to the plenary power of the state to regulate such waters, (2) the State may forbid all obstruction by the dam, (3) thus the riparian rights are inchoate until the State has given its consent, and (4) if the State can refuse permission, it may impose conditions which it thinks necessary such as that the project should be removed after 30 years.

This court then held that those were all matters arising under state laws which "this Court on writ of error must accept as final." (p. 655) "We are not concerned with the correctness of the rule adopted by the state court, its conformity to authority or its consistency with related legal doctrine." (p. 657)

illustrates the fundamental difference between federal and state authority in that the State has authority to define the nature and scope of property rights, an authority which does not rest in the federal government in any degree.

The so-called federal recapture clause strikes at the heart of state sovereignty. In the first place it would permit the federal government to engage in unconstitutional activities within the state and thus invade the sovereign rights of the state. In the second place, it obviously burdens, if it does not prevent, the development of state water-power resources in accordance with state policy. In the third place, it defeats the rights of the state to encourage and stimulate private development with consequent increase in tax resources or, on the other hand, to encourage public development with consequent public benefit from the public operation.

If the United States claims the right to recapture a project in a stream navigable or non-navigable where the owner has accepted a license providing for recapture (as provided in the license tendered by the petitioner to the respondent) such right is based solely on contract. It is elementary in the law of contracts that insofar as it relates to the transfer of property rights, the grantee can get no more by a contract of conveyance than the grantor had, and hence the federal government's right to recapture a project is subject to all of the conditions of the state permit for developing the site, including the state's right of recapture.

In this connection we wish to point out that the Wisconsin law provides that no transfer or assignment of a permit for a dam granted under section 31.06 or section

31.08, Statutes, shall be valid or of any effect whatsoever unless it is in writing and a certified copy thereof filed with the Public Service Commission of Wisconsin within ten days after the execution thereof and unless such transfer or assignment is approved in writing by the Commission.

The section also prohibits the transfer or assignment of a permit to a foreign corporation.[1]

Thus the permittee under Wisconsin law has no power to enter into a contract with the United States wherein he agrees to allow the United States to recapture the project.

In *Hudson County Water Co. v. McCarter,* 209 U. S. 349, 356, the court held that "one whose rights, such as

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[1] "31.21 **Transfer of permit.** (1) No transfer of assignment of any permit granted under section 31.06 or section 31.08 shall be valid or of any effect whatsoever unless the same shall be in writing and a certified copy thereof shall, within ten days after the execution thereof, be filed with the commission and unless such transfer or assignment is approved in writing by the commission; and no such transfer or assignment shall be approved by the commission except after an investigation and a finding that the transfer or assignment is not made or intended to be made for a purpose or to create a condition prohibited by section 31.22. No permit shall be transferred or assigned to a foreign corporation, nor shall any permit granted to a municipality be assigned or transferred to any person, firm, or corporation, otherwise than as security for a loan made in good faith and concurrently with and as consideration for such transfer or assignment, and no foreign corporation shall have power to acquire title to any such permit, nor shall any person, firm or corporation have power to acquire title to a permit granted to or acquired by a municipality, otherwise than in the enforcement of such security, and in no case shall any such foreign corporation hold title to or operate under any such permit for a period longer than three years.

(2) No municipality shall make or execute any lease or other contract with any person, firm, or corporation for the sale or use of hydraulic or hydroelectric power developed or generated by such municipality under a permit granted under section 31.06 or section 31.08 for a period longer than ten years, unless the same shall be first approved by the commission, after investigation and upon a finding that such lease or contract will not impair or interfere with the purpose or uses for which such dam was acquired or constructed by the municipality.

they are, are subject to state restriction cannot remove them from the power of the state by making a contract about them, and that the contract will carry with it the infirmity of the subject matter. The court further found that the contract involved in that case was not within the protection of the 14th amendment to the Federal Constitution.

The United States is likewise powerless to enter into such a contract because the state forbids it and because section 9 (b) of the Federal Power Act provides that before a license may issue satisfactory evidence shall be furnished to the Commission "that the applicant has complied with the requirements of the laws of the State, or States, within which the proposed project is to be located with respect to bed and banks and to the appropriation, diversion, and use of water for power purposes and with respect to the right to engage in the business of developing, transmitting, and distributing power, and in any other business necessary to effect the purposes of a license under this act."

Among other contract provisions in the license tendered by the Federal Power Commission to the respondent (Record, pp. 2665-2675) or which under the act (construed as petitioner contends for) could have been imposed and which are in conflict with the Wisconsin Statutes and are particularly objectionable are the following:

Article XVIII (Record, p. 2671) requires the licensee benefited by the construction work of another licensee, a permittee, or the United States of a storage reservoir or other headwater improvements to reimburse the owner of such reservoir or other improvements for such part of

the annual charges "for interest, maintenance, and depreciation" thereon as the Commission may deem equitable.

The last paragraph of section 10 (f) of the Federal Power Act goes so far as to provide that any unlicensed project (which includes projects authorized by state law) in the stream which is benefited by the construction work of a licensee or permittee, the United States, or any agency thereof shall pay annual toll in such amount as the Commission shall determine and fix as reasonable and equitable. This provision conflicts with the policy of Wisconsin to equalize stream flow in its principal rivers through the agency of quasi-public corporations operating pursuant to Chapters 335, Laws of Wisconsin for 1907, and 640, Laws of Wisconsin for 1911 as amended.[1] As has already been pointed out, page 13 of this brief, under these public acts, water storage reservoirs for stream regulation have been constructed in the headwaters of the principal rivers of the state, namely, the Wisconsin, Tomahawk, Chippewa, and Flambeau. The reservoirs, 25 in number, have a total storage capacity of 32,533 million cubic feet of water.[2] The reservoirs are constructed and operated at the cost of the water powers benefited, each paying in proportion to the benefits conferred upon it by the reservoir system, the Public Service Commission of Wisconsin being the state agency authorized to determine the amount of tolls to be paid by each toll payer. The Wisconsin Legislature of 1939 enacted chapter 441 of the laws of that year authorizing the Wolf River Reservoir Company to construct water storage reservoirs in the headwaters of the Wolf River and to collect tolls in proportion

[1] Amendments are not material as they do not change policy.
[2] Records of the Public Service Commission of Wisconsin.

to the benefits conferred on the water powers in the Wolf and Fox Rivers. If the state has power to authorize, regulate, fix and determine the tolls to be paid by water powers benefited by these projects, as it clearly has, it would seem apparent that the federal government is wholly without power to do so.

The policy of how a stream, which is not navigable under federal law, shall be developed in the interest of navigation or power or recreation or whatnot is purely a state function. The requirement in the federal license that the lower water power pay to an upper water power for incidental benefits which may result from the operation of a mill pond cannot be implied from the jurisdiction of the United States to regulate commerce or from the power of the United States to restrain a dam owner from so operating his dam as to substantially impair the navigable capacity of navigable waters of the United States. It attempts to invade the state's reserved power to determine the law and policy under which the state's water resources shall be developed.

The only provision in the Wisconsin laws permitting the collection of tolls from lower water powers benefited by the upper developments on a stream are those authorized and sanctioned under the three acts above referred to, namely, Chapter 335, Wisconsin Laws for 1907, Chapter 640, Wisconsin Laws of 1911, and Chapter 441, Wisconsin Laws for 1939 (Session Laws) which acts permit only the storage of surplus water for release during low stream flow (reservoir developments). Corporations authorized to charge tolls under these acts are public or quasi public in nature and have specific legislative author-

ity to collect such tolls subject to regulation and approval by the Public Service Commission of the state.[1]

It is the policy of Wisconsin not to require a lower water power to pay to an upper private owner of a dam having a large millpond or a water storage reservoir for incidental benefits due to the storing of flood waters which, except for the storage capacity of the millpond or reservoir, would be wasted. Permitting a private water power to collect tolls from a lower water power discourages (so the legislature assumes) the development of the streams for power.

Thus the Northern States Power Company operates four reservoir dams for stream regulation and one dam for power and storage in the headwaters of the Chippewa River in Wisconsin. The combined storage capacities of these five projects is 6,082 million cubic feet.[2] This private corporation is without power to collect tolls from water powers benefited by the operation of said dams.

[1] The provision of Chapter 335, Laws of 1907, providing for collection of tolls is section 4, and provides as follows: "When said Wisconsin Valley Improvement company shall have created or acquired and maintained in successful operation water reservoirs in accordance with this act * * * it shall, subject to the supervision and control hereinafter provided for, be entitled to charge, collect and receive reasonable and uniform tolls from the owner or owners or lessee or lessees of each and every improved and operated water power located upon the Wisconsin river, or any tributaries thereof, below any said reservoirs and benefited thereby, but not exceeding in the aggregate of all its revenues sufficient to pay all reasonable costs of operation and maintenance and a net annual return of six per cent on the cash capital actually paid in on stock subscriptions to the grantee. Said tolls shall be semi-annually fixed, ascertained and determined by the railroad commission of Wisconsin (now Public Service Commission of Wisconsin) on or about the first day of July and the first day of January of each year, for the six months' period preceeding each of said dates. Said tolls shall be fixed in proportion to the benefits conferred by the reservoir system upon each of the improved and operated waters aforesaid. * * *" The provisions of the other two acts providing for tolls are similar.

[2] Records of the Public Service Commission of Wisconsin.

Under Article XVIII of the license tendered by the Federal Power Commission to the respondent in this case, all lower water powers would be required to pay if the foregoing projects were licensed by the Federal Power Commission or permitted by the War Department.

Article IV of the license tendered the respondent requires the project works to be constructed in conformity with plans approved by the Federal Power Commission. This provision conflicts with section 31.12,[1] Wisconsin Statutes, which requires the approval of plans by the Public Service Commission of Wisconsin.

Article V of the license tendered the respondent requires that the construction be subject to the approval of the United States Engineers Office. This provision also conflicts with section 31.12, Wisconsin Statutes.

Article XIII of the license tendered the respondent subjects the operation of the project and the control of the level of the pool to the Secretary of War, which is in conflict with section 31.02, Wisconsin Statutes,[2] under

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[1] Section 31.12 is printed as an appendix.

[2] "31.02 **Powers of commission.** (1) The commission, in the interest of public rights in navigable waters or to promote safety and protect life, health and property is empowered to regulate and control the level and flow of water in all navigable waters and may erect, or may order and require bench marks to be erected, upon which shall be designated the maximum level of water that may be impounded and the lowest level of water that may be maintained by any dam heretofore or hereafter constructed and maintained in navigable waters; and shall establish and maintain gauging stations upon the various navigable waters of the state and shall take other steps necessary to determine and record the characteristics of such waters.

(2) The commission is vested with authority and power to investigate and determine all reasonable methods of construction, operation, maintenance, and equipment for any dam so as to conserve and protect all public rights in navigable waters and so as to protect life, health and property; and the construction, operation, maintenance and equipment, or any or all thereof, of dams in navigable waters shall be subject to the supervision of the commission and to the orders and regulations of the commission made or promulgated under the provisions of this chapter of the statutes."

which the Public Service Commission of Wisconsin has power to regulate the level and flow of waters.

Article XIV of the license tendered the respondent provides that the project shall be operated in the interest of flood control. This provision conflicts with section 31.02, Wisconsin Statutes.

Article XVII of the license tendered the respondent directs the licensee to remove and destroy brush and timber. This provision conflicts with section 31.18 (4),[1] Wisconsin Statutes, which authorizes the Public Service Commission of Wisconsin in its discretion to determine whether any or all of the brush and timber shall be removed.

Article XIX of the license tendered the respondent requires the licensee to pay tolls to a licensed owner or a reservoir or other improvement, from the operation of which the licensee receives benefits. For reasons heretofore set forth, pages 19-22 of this brief, this provision conflicts with Wisconsin policy.

Article XXIII of the license tendered the respondent requires permission of the Federal Power Commission before an owner may voluntarily sell his property, which conflicts with section 31.21, Wisconsin Statutes.[2]

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[1] "31.18 (4) The public service commission shall in the interest of public rights in navigable waters, or to promote safety and protect life, health and property, require the grantee of any permit, under this chapter, or of any permit or authorization heretofore provided for by legislative enactment, prior to flowing any lands by the construction of a dam thereunder, to remove from such lands all or any portion of the standing and fallen timber and all or any portion of the brush."

[2] Printed footnote page 17 of this brief.

IV.

CONCLUSION

It is unnecessary to repeat the importance to this state (and to all states) of many of the petitioner's contentions as to the scope, purpose and intent of the Federal Power Act, and particularly Section 23 (b) thereof, and the attempt to assert federal jurisdiction over power structures erected in non-navigable streams (in a federal sense) where those structures in no sense substantially affect adversely either commerce or the navigable capacity of any navigable waters of the United States.

For reasons set forth herein it is submitted that the Act was never intended to so extend federal jurisdiction, and if so intended and construed, it is unconstitutional as a plain usurpation of the rights reserved to the states under the Tenth Amendment to the Constitution of the United States. It is inconceivable that the interstate commerce clause of the Federal Constitution could have been intended to be so far reaching in consequences as to wrest from the states control over waters upon which there is no commerce at all. To so extend federal power and jurisdiction under the commerce clause is to destroy the federal system. The states would no longer have any sovereign rights over any waters.

Many of the provisions of the licensing sections of the Federal Power Act are in excess of federal power under the Constitution even when applied to structures erected in navigable waters of the United States as, for instance, the so-called recapture clause and other provisions not related to navigation (commerce). Most (we submit all) of

the licensing provisions are in excess of federal power when it is attempted to apply them to a project located in non-navigable waters and the operation of which does not substantially affect adversely either commerce or the navigable capacity of navigable waters of the United States.

The clash and conflict between the water power act of the State of Wisconsin and the various reservoir acts of the State and the Federal Power Act, construed as the petitioner contends it must and should be construed, is clear and irreconcilable. The Wisconsin legislation is within the field of state sovereignty and jurisdiction over navigable and non-navigable waters. When the petitioner attempts to assert power and rights in conflict therewith, as it does in the instant case, it acts in excess of constitutional power and invades the sovereignty of the states.

Respectfully submitted,

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"31.12 **Map, profile and plans.** (1) The grantee of a permit under section 31.06, to construct, maintain and operate a dam, before commencing any work of construction authorized by the permit, shall submit to the commission a complete map and profile on the scale of not less than one inch per thousand feet showing the land that may be affected by the construction and maintenance of the dam, or by any flowage that may be caused thereby, and the outline of the flowage, and such other hydrographic and topographic data as the commission may prescribe, and shall also file complete detailed plans and specifications for the proposed dam, including all booms, piers, or other protection works.

(2) The commission shall examine the map, profile, plans and specifications; shall hear the grantee thereon and may reject the same or any part thereof, if unsatisfactory or incomplete, or may suggest and require modifications thereof. If the map, profile and plans and specifications are satisfactory and complete, or, if the same shall be modified as suggested and required, the commission shall so find and approve the same, and thereupon the grantee shall have authority to construct the proposed dam in accordance therewith, but the commission may, at any time during the construction of any dam and in the interest of the public safety, or of any public rights in navigable waters, authorize, order or require such changes in the plans and specifications and the construction of the dam as shall be necessary.

(3) If the commission, in the case of an application for a permit to construct a dam with a capacity of less than two hundred fifty hydraulic horse power at ordinary stage of water, shall find that the information and data furnished in the original or amended application is sufficient, the applicant shall not be required to furnish the additional or more detailed information or data specified in subsections (1) and (2) of this section. The commission may, however, at any time during the construction of any such dam authorize, order or require changes in the construction or the method or plan of construction thereof, as provided in subsection (2) of this section.

(4) Within ten days after the completion of any dam the grantee shall file with the commission a verified statement that the same was constructed in accordance with the plans and specifications approved by the commission; or in case no plans and specifications were required to be filed, then that the dam was constructed in accordance with the description contained in the application.